

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

DAVID C. DARCHUK,	C061953
Plaintiff and Appellant,	(Super. Ct. No. 39-2008-
v.	00188036-CU-WM-STK)
STATE PERSONNEL BOARD,	
Defendant and Respondent;	
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,	
Real Party in Interest and Respondent.	

The California Department of Corrections and Rehabilitation (the department) dismissed David C. Darchuk from his employment as a youth correctional counselor because Darchuk falsely claimed a ward had assaulted or tried to assault him and/or another counselor. In this mandamus proceeding, Darchuk challenged the decision of the State Personnel Board (the board) upholding the department's action, asserting the decision was not supported by substantial evidence and the penalty of

dismissal was an abuse of discretion. The trial court rejected both arguments.

On appeal, Darchuk offers three arguments. First, the board's factual findings were insufficient to establish dishonesty because they did not establish an intentional misrepresentation of a known fact or a disposition to deceive. Second, the evidence was insufficient to establish these same elements. Third, the penalty of dismissal was excessive as a matter of law.

Finding no merit in these contentions, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The board's findings of fact were in pertinent part as follows:

In October 2003, Darchuk was working for the department as a youth correctional counselor. During Darchuk's shift, the door to ward Matthew L.'s cell was opened by mistake, and the ward ran out. Darchuk and two other counselors, Luis Holguin and Rowland Joe Siaisiai, yelled at him to stop. When he failed to do so, they pursued him. The ward ran across the dayroom toward the laundry room, then turned back after looking in. As he ran away from the laundry room, Siaisiai approached from the ward's right and Darchuk approached from his left. The ward raised his arms in a defensive manner and ran toward Darchuk, with Siaisiai following closely behind. Darchuk sprayed the ward with mace, which appeared to have no effect. At about the same time, Siaisiai grabbed the ward's right hand and pulled him

to the floor on his stomach. Siaisiai could not see well because of the mace. Darchuk grabbed the ward's left hand. The ward struggled in an effort to get up, but the counselors held him down and placed him in handcuffs.

Later that day, Darchuk prepared a behavior report regarding the incident. In that report, Darchuk wrote that Siaisiai "pulled ward L. to the floor where L. continued resists [sic] and assault [sic] both [Siaisiai] and myself."

(Underlining omitted.) That same day, Darchuk prepared a use of restraints report, in which he described the need for the use of the mace as including "[a]ssaultive action on staff."

(Underlining omitted.)

In his behavior report of the same date, Siaisiai wrote that after he grabbed the ward's arm and commanded him to get down on his stomach, the ward was "struggling and attempting to get up from the ground."

In Holguin's supplemental behavior report of the incident, he did not state there was a staff assault, or that the ward was kicking or attempting to hit anyone. In fact, none of the reports filed by other staff members alleged or reported there had been a staff assault, and none of the entries in the staff logs that day indicated there had been a staff assault.

After viewing the reports and a videotape of the incident, Darchuk's supervisors had concerns about his assertion there was a staff assault, because a staff assault by a ward is a very serious matter that can result in criminal charges and penalties. When Darchuk's supervisor asked him what he meant by

the statement that the ward had assaulted both him and Siaisiai, Darchuk admitted the ward did not assault him but did assault Siaisiai. The supervisor instructed Darchuk to prepare a supplemental behavior report. In that supplemental report, prepared a week after the incident, Darchuk wrote that when Siaisiai pulled the ward to the floor, the ward "continued to resist" and "was kicking [Siaisiai] and attempting to strike him with his fists." (Underlining omitted.)

The department conducted an administrative interrogation of Darchuk, and he was evasive as to his use of the term "assault" and stated that his original behavior report was a "draft." He described an "assault" as uninitiated or unsolicited contact with the ward. When asked whether the ward was kicking, he responded that the ward was resisting and attempting to get back off the ground. He continued to assert that the ward was trying to hit Siaisiai.

Under the memorandum of understanding (presumably with Darchuk's union), the department considers an assault to involve an actual, physical attack on staff, such as attempted or actual physical contact, or throwing a vile substance on staff.

In October 2004, Darchuk was served with a notice of adverse action dismissing him from his counselor position for inexcusable neglect of duty, dishonesty, discourteous treatment of the public or other employees, willful disobedience, and

other failure of good behavior.¹ The charges were based on the assertion that he had falsified his claims that the ward assaulted him and Siaisiai and that he was evasive, deceptive, and intentionally distorted material facts during his interrogation.

Darchuk appealed his dismissal to the board. A hearing was eventually held in February and April 2007. A proposed decision was rendered in March 2008, and the board adopted it without modification in April 2008.

In its decision, the board made the findings of fact set forth above. Based on a number of considerations -- including the variations in Darchuk's descriptions of the incident, the fact that no one else reported a staff assault, and a careful review of the videotape and photographic evidence -- the board specifically chose not to believe Darchuk's testimony that he believed the ward was attempting to assault staff.

Based on its findings of fact, the board sustained the charges against Darchuk (except as noted in the footnote). The Board also determined the penalty of dismissal was just and proper under the circumstances.

In July 2008, Darchuk commenced this proceeding by filing a petition for writ of mandamus against the board, asserting there was no substantial evidence to support the board's findings and

¹ Inefficiency was also asserted as a ground for the adverse action, but the board ultimately dismissed that charge based on insufficient evidence.

the board abused its discretion by imposing the penalty of dismissal.

In January 2009, the superior court concluded the board's decision was supported by substantial evidence and the penalty of dismissal was appropriate. Accordingly, the court entered judgment against Darchuk. Darchuk filed a timely notice of appeal.

DISCUSSION

I

Standard Of Review

In reviewing disciplinary actions, "the Board acts in an adjudicatory capacity," "much as a trial court would in an ordinary judicial proceeding. Thus, the Board makes factual findings and exercises discretion on matters within its jurisdiction. On review the decisions of the Board are entitled to judicial deference. The record must be viewed in a light most favorable to the decision of the Board and its factual findings must be upheld if they are supported by substantial evidence. [Citation.] In addition, the Board's exercise of discretion must be upheld unless it abuses that discretion." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 823.) Abuse of discretion is shown if the Board's decision is not supported by its findings. (See Code Civ. Proc., § 1094.5, subd. (b).)

"The substantial evidence rule measures the quantum of proof adduced at a hearing and assesses whether the matters at issue have been established by a solid, reasonable and credible

showing. . . . [¶] The abuse of discretion standard, on the other hand, measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." (*Department of Parks & Recreation v. State Personnel Bd.*, *supra*, 233 Cal.App.3d at pp. 830-831.)

Our scope of review on appeal from a judgment in a case like this is identical to that of the trial court. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.)

II

Sufficiency Of The Findings

Darchuk argues that all of the charges against him essentially boil down to dishonesty, and "the Board's cumulative factual findings do not establish the essential elements of dishonesty which are an intentional misrepresentation of a known fact and a disposition to deceive."² We disagree.

The board essentially found that the concept of a staff assault is commonly understood in the area of Darchuk's employment as an actual, physical attack, such as attempted or actual physical contact, or throwing a vile substance on staff.

² It does not appear Darchuk raised this same issue in the trial court, as his petition, and the court's judgment, addressed the sufficiency of the evidence to support the findings, and not the sufficiency of the findings to support the decision. Nevertheless, because the department does not assert the issue was forfeited but instead addresses it on its merit, so will we.

The board further found that while the ward struggled to get up after Siaisiai pulled him to the floor, the ward did not try to hit or kick either counselor and therefore did not perpetrate a staff assault. None of the reports filed by other staff members alleged or reported there had been a staff assault, and none of the entries in the staff logs that day indicated there had been a staff assault. Nevertheless, Darchuk stated in his initial behavior report that the ward "continued [to] assault both [Siaisiai] and myself" (underlining omitted), stated in his use of restraints report that he needed to use mace because of "[a]ssaultive action on staff" (underlining omitted), and only later partially reversed himself and admitted the ward did not assault him while still insisting the ward assaulted Siaisiai by kicking Siaisiai and attempting to strike him with his fists. During his subsequent administrative interrogation, Darchuk was evasive as to his use of the term "assault" and stated that his original behavior report was a "draft." He also retreated from his assertion that the ward was kicking but continued to assert that the ward was trying to hit Siaisiai. The board further found that a careful review of the videotape and photographic evidence did not support Darchuk's contention that the ward was attempting to assault staff.

Taken together, these findings are sufficient to support the board's determination that Darchuk's various statements about the incident were dishonest. To support a determination of dishonesty, "it is enough if the falsehoods the personnel board deemed to constitute dishonesty could be accepted by a

reasonable mind as substantial evidence in support of that deduction." (*Cvrcek v. State Personnel Bd.* (1967) 247 Cal.App.2d 827, 830.) Here, Darchuk's repeated falsehoods satisfy that test.

Darchuk contends his "actions can not[sic] be described as an attempt to deceive or to be untruthful" because "[h]e merely attempted to report what he perceived to have occurred to the best of his recollection." But this assertion "merely raised a conflict in the evidence" that "presented a factual determination for the trier of fact." (*Cvrcek v. State Personnel Bd.*, *supra*, 247 Cal.App.2d at p. 832.) Darchuk is simply trying to give his own spin to the evidence, which the board was under no obligation to credit. Given the findings that the video showed no assault, Darchuk continually changed his story about what actually happened, no one else asserted there was an assault, and Darchuk was deceptive during his interrogation, the board's determination of dishonesty was supported by its findings.

Darchuk's reliance on *Pereyda v. State Personnel Board* (1971) 15 Cal.App.3d 47 is misplaced. In *Pereyda*, the appellate court held "that the Board's disbelief of the employee's testimony cannot create evidence to the contrary." (*Catricala v. State Personnel Bd.* (1974) 43 Cal.App.3d 642, 649-650.) Thus, where the board's determination that a correctional officer violated a rule against having alcohol on the grounds of a correctional institution was based solely on the board's disbelief of the officer's "rather weird explanation" of why 6

empty wine bottles and about 20 empty beer cans were found in his quarters, the board's determination was not supported by substantial evidence. (*Pereyda*, at pp. 49-53.) This reasoning does not in any way support Darchuk's argument that "the lack of reporting an assault coupled with [the board's] finding of [Darchuk] not being credible is also not sufficient to prove that he falsified his reports with the intent to deceive." Here, unlike in *Pereyda*, there was far more than simply disbelief of Darchuk's testimony to support the board's conclusion that Darchuk's various statements about the incident were dishonest. As we have noted, the board's determination of dishonesty was supported by the findings that the video showed no assault, Darchuk continually changed his story about what actually happened, no one else asserted there was an assault, and Darchuk was deceptive during his interrogation. Accordingly, *Pereyda* is inapposite.

In summary, the board's findings are sufficient to support its determination of dishonesty.

III

Sufficiency Of The Evidence

Under the heading of sufficiency of the evidence, Darchuk asserts that a disposition to deceive "connotes that one is misrepresenting the known fact for some type of personal gain or interest," and here he "had no personal gain nor interest to falsify his reports nor his administrative responses." This is not a sufficiency of the evidence argument; nevertheless, addressing the argument on its merits, we find none.

To support his argument, Darchuk cites *Warren v. State Personnel Bd.* (1979) 94 Cal.App.3d 95, in which this court upheld the dismissal of a highway patrol officer who lied to investigating police officers and his superiors about attending a "commercially sponsored transvestite 'party' for which he paid an attendance fee." (*Id.* at p. 99.) Darchuk draws from *Warren* the rule that to constitute dishonesty, the false statements must be given "for possible personal gain." But *Warren* states no such rule. The court in *Warren* concluded that "evidence support[ing] the inference that [the officer] gave false statements to conceal his conduct" "support[ed] the finding of dishonesty." (*Id.* at p. 107.) There was no discussion of whether the officer sought to conceal his conduct for personal gain. Indeed, accepting Darchuk's argument would mean that a civil service employee who lied just for the fun of it, without anything to gain, could do so with impunity, without fear of losing his or her job. That is not the law in California.

IV

Excessiveness Of Dismissal As A Penalty

Darchuk's final argument is that the penalty of dismissal was excessive as a matter of law. But Darchuk's argument in this regard is founded on the premise that "his actions of writing the reports were based on his honest beliefs and perceptions" and that "[h]e merely attempted to record what he perceived to be the actions of the ward." In other words, he contends dismissal is excessive because of the "lack of evidence

of dishonesty." Thus, this argument appears to be nothing more than a retread of his first argument.

As we have stated already, in applying the abuse of discretion standard (as Darchuk admits we must), we must determine whether "given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." (*Department of Parks & Recreation v. State Personnel Bd.*, *supra*, 233 Cal.App.3d at p. 831.) Here, the "established evidence" was that Darchuk was repeatedly dishonest about the incident with the ward. Darchuk does not argue that the sanction of dismissal was too severe if the finding of dishonesty is sustained. Accordingly, his final challenge to his dismissal fails.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.